No. 12315

In the United States Circuit Court of Appeals

For the Ninth Circuit

P. M. BARGER LUMBER CO., a corporation doing business under the name and style of Barger Millwork Company,

Appellant

vs

J. L. WHITEHOUSE and INTERSTATE LUMBER SALES, INC.,

Appellees

Appellant's Brief

Upon appeal from the District Court of the United States for the District of Oregon

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JURISDICTION

This case involves an action for damages for breach of an express warranty, sustained by appellant, a North Carolina Corporation,in the purchase by it of a carload of doors from appellees, residents and citizens of Oregon. The breach of the express warranty related to quality and kind of doors. The amount involved exceeds, exclusive of interest and costs, the sum of $3000.00. The trial was without a jury. The jurisdiction of the

District Court is conferred by Title 28 U.S.C.A. Sec. 1332. The Pre-Trial Order appears on pages 2 to 11 inclusive of the Transcript of Record.

Memorandum opinion was rendered on May 25, 1949 (R-11) holding that one Ruth Meyer, a missing person, not a party to the case, was the vendor; further, that appellant's course of conduct was inconsistent with rescission. Judgment for appellees was entered June 16, 1949. (R-17)

Jurisdiction of Court of Appeals is conferred by Title 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

Appellant is engaged in the wholesale warehousing and selling of lumber and millwork, with its business located in Statesville, North Carolina. Appellees Whitehouse and Interstate Lumber Sales, Inc., are engaged in the wholesale lumber business in Eugene and Portland, Oregon. Ruth Meyer, a missing person, (R-111) not a party to the action, was engaged in business as a lumber broker, with her office in Portland, Oregon. (R-23). On January 10, 1948 Meyer telephoned appellant (R-25) (R-41) that there was available a carload of fir doors known to the trade as F-82, which is the brand and description of a two-panel door, specially designed and adopted by the Fir Door Institute, an organization whose established design, grade and quality standards for doors are recognized and ac-

cepted by manufacturers and distributors. (R-25-26) Appellant was interested in this specific type of product and instructed her to purchase it. (R-41). Meyer as agent, or broker, referred the order, Exhibit 3, (R-52) to Austin Dodds Company who was the predecessor (R-142) (R-198) of appellees. There is no dispute that appellees assumed the assets and liabilities of Austin Dodds Company. (R-198-199). Appellant was informed that the car of F-82 doors was rolling along to it, (R-44) and a bill of lading was received indicating that 1500 doors was enroute. The shipper, (R-54) required in advance $12,600.00 as a guarantee, (R-78) which amount was paid by appellant.

Prior to Meyer's phone call appellant was unaware of the source of these doors and with whom she was to refer the order (R-41). In the interval between receipt of the invoice and the actual arrival of the carload, and without prior inspection, appellant sold the doors to its customers. (R-56). Upon arrival of the freight car, about January 28, 1948 (R-56) the freight charges, about $1,000.00 was paid by appellant (R-56), and the doors were unloaded and distributed to its customers (R-58). Complaints were immediately received by appellant from its customers that the doors were not of the standard or quality of F-82 (R-58-59) and were being rejected. Appellant thereupon made inspection of the doors (R-60-64) and telephoned Meyer, also telegraphed, (R-59) and lodged its complaint concerning

the breach of quality of the shipment and informed her that customers were rejecting the doors. Subsequently (R-62) McLaughlin in Oregon, an employee or officer of appellees, within a week of the complaint, (R-62-63) telephoned appellant at North Carolina, to ascertain the basis for the complaint and said he would investigate the matter. On March 9, 1948 appellees wrote appellant (R-210) *Exhibit* 1, confirming their knowledge of the complaint relating to the quality of the doors and that they would make an investigation thereof and would communicate with appellant respecting some settlement. Appellees stated:

> ". . . We are reliable shippers and in the event that we do get a lemon such as this car no doubt is, we always try to do all possible to effect a settlement satisfactory to the customer . . ."

Appellant had been instructed to hold the doors (R-66-67) until instructions pertaining to their disposition could be given.

There is no dispute that the shipment of doors was not as expressly warranted and was not the grade and design known as F-82, but was inferior in every respect. In the course of appellees investigation with the factory from whom they purchased these doors, they had written to their buyer, *inter alia*, as follows: *Appellant's Exhibit No.* 5, (R-216)

> ". . . The doors were represented to Lytle as F82 Fir Doors and that they would not run over 2% B

Grade. In the first place they were not F82 doors. They were instead a 2 panel door but not a stock item. From what information we have been able to gather they had very, very narrow styles and rails. In other words they were not a standard pattern F82 door. In the second place the customer stated that 60 to 70% of the doors might by wide stretch of imagination grade out B grade and there were a considerable number of doors that would grade C and D. He said that on close inspection one might find a few A. doors . . . We talked to him on the phone and he told us that he just didn't know where he would sell them unless he could get some contractor to take these doors and put them in a bunch of houses. In other words being as they are not stock items they cannot be used as replacements nor can they be sold very readily to the ordinary trade. The millwork company has been exceedingly nice about this lousy shipment and I have tried from here, both by wire and by prone, to get some settlement from the Grant Manufacturing Co. My efforts have resulted in nothing. I even tried to scare them into making a settlement but I got no where . . .

(R-217)

"In attempting to make a settlement on these I asked for a dollar per door rebate and figured that we could probably get back a quarter from Ruth Meyer per door which would at least pay the guy his freight on his load of junk and give him about four bits a door to lop off the price . . .

(R-218)

"My own personal opinion on this is an open case of fraud on the grades alone not considering that the doors were not stock F-82 . . ."

Interstate Lumber Sales,

/s/ MAC
S. P. McLaughlin

Appellees also had written appellant on March 9, 1948. (R-69) *Exh.* 1 advising that they were making efforts to effect a settlement with the manufacturer.

Appellees, on June 25, 1948, represented they had received from the manufacturer a settlement of $315.00, and, added to that amount, the sum of $300.00 their alleged profit, (R-212), *Exh. No.* 4, and informed appellant, that the sum of $615.00 was the best settlement they could offer. (R-73-74) They also stated: " . . . *We feel responsible for this shipment and realize you have had a tough problem on your hands in trying to dispose of this stock* . . . " (R-73). The truth however was that appellees had made a profit (R-182) in excess of $1000.00. Appellant rejected the proposed offer of settlement. (R-104). Mr. Barger, appellant's manager, informed appellee he would visit their office in Oregon and discuss the matter which he did in October, 1948 (R-75-104-105) The shipment of doors was valueless to appellant. (R-76) It was not the type or quality of merchandise it marketed, and there was no possible sale in North Carolina. Appellees definitely refused to indicate to appellant (R-77) what it was to do with the shipment and it was therefore necessary to warehouse the same. To this day the shipment is stored in a warehouse in North Carolina.

THE QUESTIONS INVOLVED

1. Were appellees the vendors in the sale of the carload of doors to appellant, as principal, through the agency of Meyer?

2. Was the carload of doors of the grade and quality known as F-82 as warranted by the vendors?

3. Did the appellant have the right of inspection prior to acceptance of the shipment?

4. Did appellant give reasonable notice of its rejection of the shipment as being in violation of the express warranty as to quality?

5. Was there an accord and satisfaction?

6. That the findings of Fact are contrary to and are not supported by substantial evidence and are clearly erroneous.

SPECIFICATIONS OF ERROR

1. The court erred in Finding of Fact VI (R-14) holding that appellees agreed to sell to Ruth Meyer, a wholesale lumber dealer, a carload of F-82 fir doors, which carload at her request was shipped to appellant in North Carolina; in that, said finding is contrary to substantial evidence to the effect that appellees, as vendors, sold the carload of doors to appellant, as principal, through Ruth Meyer as agent.

2. The court erred in Finding of Fact VII (R-14) holding that the doors were purchased from appellees by Ruth Meyer, in her capacity as an independent wholesale lumber dealer, and not as an agent of appellant; in that, said finding is erroneous and contrary to substantial evidence to the effect that Meyer was a lumber broker or agent, and acted in that capacity in purchasing the carload from appellees on behalf of appellant who was either the disclosed or undisclosed principal.

3. The court erred in its Conclusions of Law II (R-15) that neither appellee sold any doors to appellant, and that the only sale of doors was to Ruth Meyer, as principal, and that no contractual relationship of seller and buyer or other contractual relationship existed at any time between appellees and appellant; in that appellees, as vendors, sold and delivered a carload of doors to appellant, as the principal, on an order placed and paid for by appellant, as a principal, through Ruth Meyer, as agent, and that appellees being the vendors, their legal liability for breach of warranty follows as a matter of law.

4. The court erred in its Conclusions of Law III (R-16) that appellant failed to prove any claim for breach of warranty in the nature of recission

against appellees, and that if appellant has a claim it is against Ruth Meyer or her estate. Appellant contends that all the evidence in the case, is to the effect that appellant as a disclosed principal, ordered through Ruth Meyer, as agent, a carload of doors of the grade or quality known as F-82, and that said carload of doors, sold by appellees, did not contain that grade, or quality specified, but were wholly inferior doors, and upon prompt inspection by appellant, the breach of warranty being obvious, due notice was given to appellees who acknowledged the complaint and assured appellant as purchaser, that consideration would be given it in due course of events after consulting manufacturer.

(a) APPELLEES, AS VENDORS, SOLD THE DOORS TO APPELLANT, A DISCLOSED PRINCIPAL, AS VENDEE, THROUGH THE AGENCY OF MEYER, AS LUMBER BROKER OR AGENT

(b) EVEN THOUGH THE CONTRACT FOR THE SALE OF THE DOORS IS ASSUMED TO HAVE BEEN MADE IN THE NAME OF MEYER, AS OSTENSIBLE PRINCIPAL, THE REAL PRINCIPAL, APPELLANT, MAY MAINTAIN THIS ACTION AGAINST THE VENDOR.

ARGUMENT

Meyer maintained a 2-room suite in a downtown office building in Portland (R-143). She had no lumber yard. (R-146).

On January 10, 1948, she telephoned Lytle, an employee or officer of appellees, (R-136) and inquired if there were some doors available. Lytle informed her he had a carload and gave her the description and said it was subject to prior sale. She informed him that she would (R-137) endeavor to find a customer. She later placed with appellees the order, *as agent. Exhibit* 3. (R-52) Appellees were informed that the customer was appellant. (R-145) (R-146) Appellees did not have the carload on hand, but they, as wholesalers, knew where it could be obtained. (R-148). As soon as Meyer placed the order, appellees, contacted the manufacturer (R-164) and on January 12, 1948, Exhibit Q, an invoice was issued and a draft drawn wherein appellees purchased a carload of doors. (R-166) *Appellees extended no credit to Meyer and insisted upon a guarantee,* (R-78) *which guarantee she obtained from appellant, and, upon confirmation of the guarantee,* appellees endorsed the order bill of lading which controlled the content of the carload of doors. (R-175) In other words Meyer had no credit standing with appellees and the only method of payment was by the medium of drafts, the appellant guaranteeing the payment.

During all this time the carload was en route from the manufacturer to Statesville, North Carolina, with appellees as the consignee. (R-180) The carload at the time of shipping, was not to be delivered to appellant, where it was destined, until the bill of lading was delivered to the railroad company. (R-180) *The title to the shipment was in appellees* (R-181) until January 19, 1948 when the draft was honored.

The above evidence, we submit, makes it inescapable that Meyer, as agent, for a disclosed principal, the appellant, ordered from appellees, as vendors, a carload of F-82 doors. The law is well established that a principal is entitled to maintain an action upon a contract made by his agent with a third person.

This rule is found in 2 *Am. Jur. Sec.* 388, page 304:

> "*One who contracts with a duly constituted and authorized agent acting on behalf of a disclosed principal, where the principal is named as the contracting party, is bound by the contract and liable on it to the principal to the same extent as if he had contracted with the principal in person.* A principal by ratification may also enforce a contract entered into by one assuming to act in his behalf, but without authority. *According to the American Law Institute, the liability of a third person to a disclosed principal is not affected by rights which he may have against the agent . . .*"

The *Restatement of Law of Agency, Section* 292, *page* 658, also supports the above principle as follows:

> "The other party to a contract made by an agent acting within his power to bind a disclosed or

> partially disclosed principal is liable to the principal as if he had contracted directly with the principal, unless the principal is excluded as a party by the form or terms of the contract."

Appellees, by their counsel, acknowledge that Meyer was the agent of appellant. (R-110)

Appellant dealt with Ruth Meyer in her capacity as a lumber broker or agent, and not as a wholesaler (R-42). Appellant knew that she did not own nor manufacture the doors, and that her interest was solely as a broker, on a commission basis.

Appellees, however, occupied a different position. They actually owned the doors. Their letterhead, too, indicated that they were in the lumber business. (R-209-210-212-215-216-221-227). Prior to the sale of this particular shipment, appellees had sold to appellant as principal, through Meyer, other doors described as of the grade F-82. These doors had been obtained by appellees from an unknown source (R-143). Appellees informed Meyer (R-144) they had for sale a second carload of *grade F*-82 doors and that is the carload represented to be the same as the previous one. They at no time disclosed the source of their supply. *They knew she was not purchasing doors for her own account, but for the account of another, on a commission basis.* (R-145) They knew she was acting as an agent or broker and that appellant, as principal, was the customer. (R-146) They knew she had no lumber

yard nor warehouse, and that her place of business was only a two-room suite in a downtown office building in Portland. (R-142).

There is a well-defined distinction between a broker and a wholesaler. A wholesaler buys for himself and a broker buys or sells for someone else (R-116). *Exh. Q*, (R-166), supports the viewpoint that appellees were the owners of and had title to the carload of doors. They had purchased the doors on January 12th, 1948, from the manufacturer (R-179). *They forwarded this carload direct to themselves in North Carolina* on an order bill of lading. (R-180) Meyer never at any time had the doors in her possession, and, there is no competent evidence that she was purchasing the doors for herself, as principal. *The title to the doors,* from the time they left the factory, until they reached North Carolina, *was in appellees.* Meyer as an agent or broker was only the instrumentality for obtaining an order from appellant and the purchase price to be remitted to appellees.

> "As generally defined, a broker is an agent who, for a commission or brokerage fee, bargains or carries on negotiations in behalf of his principal as an intermediary between the latter and third persons in transacting business relative to the acquisition of contractual rights, or to the sale or purchase of any form of property, real or personal, the custody of which is not intrusted to him for the purpose of discharging his agency. . . "

8 *Am. Jur. Sec.* 2, page 989

Promptly upon discovery of the breach of warranty appellant contacted Ruth Meyer, (R-59), and she immediately informed appellees of their breach of warranty and *they assumed all responsibility in connection with the sale* and agreed to make an investigation. (R-62-63) They directed a letter to appellant, reading, inter alia, as follows: (R-210) *Exh. 1.*

> "Quite some time ago *we shipped, through Ruth Meyer*, a carload of doors that were evidently not only not up to grade specifications, but were apparently a peculiar type of 2-panel door. *You were not satisfied with the shipment, and we of course called you direct on it in an effort to ascertain what the reasons were for the claim. . . .*
>
> "Be assured again that we have not forgotten this claim, nor are we attempting to let it drag out to a point where it would be forgotten. *We are reliable shippers*, and in the event that *we do get a lemon such as this car no doubt is*, we always try to do all possible to affect a settlement *satisfactory to the customer.*"

We further respectfully refer the court to *Exh. 4*, (R-212) wherein appellees wrote appellant, *inter alia*, as follows: (R-213)

> " . . . The car was *sold to you* thru Ruth Meyer at Portland, Oregon . . .
>
> "*We feel responsible for this shipment* and realize that you have a tough problem on your hands in trying to dispose of this stock. We have always stood behind *our shipments* and have always endeavored that *in the event of a claim on any of our cars*, have always tried to *work out a settlement with the customer* that is both fair and reasonable. Ruth Meyer who handled this order for you

> in Portland is of the same opinion and she too has agreed to put up $300.00 as her contribution in making up a settlement . . .
>
> "We trust that this settlement meets with your approval and that you will *permit us to again quote on some of your requirements.*

That the status of Meyer was that of an agent for Appellant and *not the vendor,* is fully supported by an authority squarely in point with the case at bar. *Larson vs Inland Seed Co.* 143 *Wash.* 557, 255 *Pac.* 919. Larson was a farmer, residing some distance north of Spokane. Washington. Inland Seed Company had its place of business in Spokane. Garden City Feed Mills was located at Walla Walla. Larson placed an order with the seed company for a quantity of seed spring rye. The seed company referred the order to the feed mills which order was filled without passing through the possession of the seed company. The theory upon which a recovery of damages for breach of warranty was asserted, was based on the contention that the seed company and feed mill were joint vendors. The trial court disposed of the case on the theory, *that the seed company*, who took the order, *was in legal effect only the agent of Larson in ordering the spring rye from the feed mills. It was further held to be of immaterial consequence that the check for payment was sent by the customer through the agent.* The court affirmed the case and stated:

"As to the claimed liability of the seed company to Larson it seems to us that the agreement or contract if it is desired to so characterize the understanding arrived at between Larson and the seed company by that more strict legal term we think imposed upon the seed company no other or greater duty than to order for Larson from the feed mills 1,500 pounds of spring rye, with directions to ship the rye direct to him at Loon Lake; in other words, it seems to us that there did not accompany that agreement any guaranty, express or implied, on the part of the seed company that the feed mills would ship spring rye to Larson. *This we think is rendered fairly plain by the fact that Larson well understood that the rye was to be furnished and shipped to him by the feed mills without the seed company having anything further to do with the furnishing of the rye.* It is not claimed as we understand counsel for Larson, that the seed company did not plainly direct the feed mills to furnish and ship spring rye to Larson. It is true that Larson after receiving the rye, sent his check to the seed company for an amount equal to the purchase price, but that does not change the agreement between Larson and the seed company so as to impose upon it any other duty than to send the check or its proceeds to the feed mills or return it to Larson. It seems, therefore, though of no consequence here, that the sending of the check by Larson to the seed company has ultimately resulted in the feed mills being paid for the rye. If the seed company had taken no steps looking to the shipping of the rye to Larson, it seems to us that Larson could not have recovered from the seed company in damages upon the ground of breach of a sale contract made by the seed company with him. We conclude that the evidence introduced upon the trial in behalf of Larson does not show any right of recovery against the seed company.

Considering now *the claimed liability of the*

> *feed mills to Larson, we shall look upon them as the vendors selling the rye to Larson, which is the logical result of what we have said touching the claimed liability of the seed company to Larson,* and the most unfavorable position in which the feed mills can be placed with reference to their liability to Larson. *The feed mills are in the position of receiving an order for the spring rye from Larson through the seed company.* We have seen that, in response to such order, the feed mills, without communication from or to Larson, shipped to him the 1,500 pounds of rye, as directed by the seed company, except that the shipped rye later proved to be fall rye, and that Larson accepted the rye, at the same time seeing the feed mills' disclaimer of warranty attached to each bag; . . ." (emphasis added)

The rule has been announced that *courts look beyond names to ascertain the real nature of the transaction* in order to ascertain whether a party is a buyer or occupies the relationship of an agent.

> "The primary test of whether a particular contract or transaction whereby goods are delivered or shipped by one party to another for sale by the latter creates the relation of buyer and seller or only a relation of principal and agent *is the intention of the parties to be gathered from the whole scope and effect of the language used, and mere verbal formulas, if inconsistent with the real intention, are to be disregarded.* It does not matter by what name the parties chose to designate it. *That does not determine its character. The courts look beyond mere names and within to see the real nature of the agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties,* or from some isolated provision, its legal

character and effect . . . The fact that one's commission is to be a percentage of the profits does not necessarily change his character as an agent . . ."

46 *Am. Jur. Sec.* 17, page 211

Even though the position may be taken that the contract for the sale of the doors was made with Meyer as ostensible principal, appellant, *as the real principal*, may maintain this action for breach of warranty.

The law is well established, *that the real principal may at any time appear in his true character and claim all the benefits of the contract from the other contracting party.*

In support of the above contention, we quote 2 *Am. Jur. Sec.* 410 at page 320:

"*When an agent makes a simple contract for his principal, but, contracting as if he were the principal, conceals the fact that he is an agent, the principal may at any time appear in his true character and claim all the benefits of the contract from the other contracting party*, so far as he can do so without injury to that other by the substitution of himself for his agent. It has been held that any benefit or advantage derived by the agent in the nature of a warranty, either express or implied, inures to the benefit of the undisclosed principal . . . On a sale of personal property by parol or by writing not under seal, *it is not infrequent that the title vests, not in the apparent purchaser, but in some undisclosed principal for whom the apparent purchaser was negotiating as agent*, and the authorities show that *the real purchaser, though unknown to the seller, may vindicate by suit in his own name his rights in the prop-*

> *erty*, provided that the seller or party dealing with the agent is not prejudiced by the introduction of the unknown principal in place of the agent . . . "

Though a principal to a contract may desire to remain undisclosed and act through an agent, it is a familiar rule that an undisclosed principal may sue upon the contract made by his agent to the same extent as if his relation to it were known at the time it was entered into.

The case of *Kelly Asphalt Block Company vs Barber Asphalt Paving Company*, 211 *N. Y.* 68, 105 *N. E.* 88 L.R.A. 1915C *page* 256, is squarely in point in support of the above principal, and in practically every aspect is apposite to the case at bar. In that case plaintiff sued to recover damages for breach of an implied warranty. The contract was made between the defendant and one Booth. Plaintiff says that Booth was in truth its agent, and sues as undisclosed principal. The question is whether it has the right to do so. The evidence disclosed that plaintiff and defendant were competitors in business. The plaintiff's president suspected that the defendant might refuse to name him a price. There was no basis however for his suspicion. Because, though, of his doubt the plaintiff availed itself of the services of Booth, who, though interested to the defendant's knowledge in the plaintiff's busines, was also engaged in a like business for another corporation. Booth asked the de-

fendant for a price and received a quotation, and the asphalt blocks required for the plaintiff's pavement were ordered in his name. The order was accepted by defendant, the blocks were delivered, *and payment was made by Booth with money furnished by the plaintiff.* The paving blocks were unmerchantable, and the defendant, retaining the price, contests its liability for damages on the ground that if it had knowledge that the plaintiff was the principal, it would have refused to make the sale.

Justice Cardozo, who wrote the opinion, concluded:

> "We are satisfied that upon the facts before us the defense cannot prevail. A contract involves a meeting of the minds of the contracting parties . . . . .
>
> "The defendant was contracting with the precise person with whom it intended to contract. It gained whatever benefit it may have contemplated from his character and substance . . . An agent who contracts in his own name for an undisclosed principal does not cease to be a party because of his agency . . . Indeed, such an agent, having made himself personally liable, may enforce the contract though the principal has renounced it . . . As between himself and the other party, he is liable as principal to the same extent as if he had not been acting for another. It is impossible in such circumstances to hold that the contract collapses for want of parties to sustain it . . . If Booth had given the order in his own right and for his own benefit, but with the expectation of later assigning it to the plaintiff, that undisclosed expectation would not have nullified the contract. His undisclosed intention to act for a principal who was unknown to the defendant was equally ineffective to destroy

the contract in its inception . . ."

Justice Cardozo, concluding that Booth made no misrepresentations to the defendant, continued with the opinion, and said:

> "The validity of the contract turns thus, according to the defendant, not on any overt act of either the plaintiff or its agent, but on the presence or absence of a mental state. We are asked to hold that a contract complete in form becomes a nullity in fact because of a secret belief in the mind of the undisclosed principal that the disclosure of his name would be prejudicial to the completion of the bargain. We cannot go so far. It is unnecessary, therefore, to consider whether, even if fraud were shown, the defendant, after the contract was executed, could be permitted to rescind without restoring the difference between the price received for the defective blocks and their reasonable value. It is also unnecessary to analyze the evidence for the purpose of showing that the defendant, after notice of the plaintiff's interest in the transaction, continued to make delivery, and thereby waived the objection that the contract was invalid.

The case was affirmed on the general principle, *that a contract made in the name of an agent as ostensible principal, may be sued on by the real principal at the latter's election.* And that is precisely the problem presented in the case at bar. All the evidence in the case established that Meyer was required to obtain the purchase price of more than $11,000.00 from appellant, as the principal. Irrespective of whether appellees claim, and disingenuous as it is, that appellant was unknown to them as the purchaser, the law, above

stated, unquestionably supports this cause of action in appellant's favor.

In further support of the above principle of law, we quote from *Usher vs Daniels*, 73 *N.H.* 206:

> "The doctrine that an undisclosed principal may sue in his own name upon a written as well as an oral contract made by an agent in his own name, and that parol evidence is admissible to prove the plaintiff's interest, is well established . . . "

And we find in 130 *A.L.R.* at page 669:

> "However, the mere fact that the third party contracted with the agent upon the *supposition* that the latter was dealing for himself, *or made calculations based on that supposition, will not defeat recovery by the principal.* And even the fact that the third party was misled by the pretense of the agent that he was dealing for himself *is not usually regarded as material or prejudicial*; . . . "

In the light of the above well established principles of law, the trial court erred in its findings of fact and conclusions of law holding that appellant's claim was against its agent Meyer and not properly against appellees as vendors.

THE DOORS WERE SOLD BY DESCRIPTION AND THE FAILURE TO SHIP DOORS SPECIFICALLY DESCRIBED IS A BREACH OF AN EXPRESS WARRANTY.

ARGUMENT

Appellees cannot dispute the premise that appellant ordered doors specifically described as F-82. This description of a two panel door is particularly recognized in the millwork trade. (R-25-26)

> "DEFINITION OF EXPRESS WARRANTY. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon . . ."
>
> *Section* 71-112 Oregon Compiled Laws Annotated

An examination of *Exh.* 3 (R-52) makes it unassailable that the buyer was ordering doors of a certain quality and of a definite description. No one disputes that doors described as F-82 was the only order placed with appellees, and they do not deny that the shipment did contain that quality or grade. Appellees in fact, acknowledge in writing that the doors shipped to appellant amounted to a fraud, (Exh. 5, R-216) and, to use their own expression, was a "load of junk . . ."

There is no dispute that the description, F-82, is similar to a particular brand of merchandise, and, should it be asserted, that no express warranty was given, yet the law is, that the sale of an article described as of *particular brand* implies a contract that shall be of the quality which that brand implies. See

Springfield Shingle Co. vs Edgecome Mill Co. 52 Wash. 620. In that case an action for damages was filed upon the sale and delivery of certain shingles, known to the trade as "Star A Star". The shingles delivered were not of that grade, but were of an inferior grade, and not worth the price paid. The evidence found by the court indicated that "Star A Star" was a brand of shingles of superior quality, generally manufactured in the state and that it was a custom established among shingle manufacturers to have such shingles conform to certain specifications, and that when shingles were stamped and packed as "Star A Star" such label indicated that the shingles came up to and fully met the specifications required. In affirming a judgment for damages and citing numerous authorities the court concluded:

> ". . . We therefore approach the determination of the legal question involved herein with the finding *that the shingles were sold and purchased as "Star A Star" shingles* . . . It would not require a very vivid imagination, under these circumsances, to hold that they were sold as "Star A Star" . . . The action is not brought upon any theory that the shingles were not good, sound, merchantable shingles, or that the timber in them was dead, rotten, or of any other unsound quality; *but the theory of the case is that the sale of an article as being of a particular description does imply a contract that the article sold is of that description,* a doctrine that is supported by abundant authority . . . and if this condition be not performed, the vendee is entitled to reject the article, or, if

> has paid for it, to recover back his money." (Emphasis added)

Another authority in point is *Baker vs J. C. Watson Co.* 134 Pac. (2) 613, (Ida.) where it was held that if the contract for sale of peaches was for U.S. No. 1's, the buyer was required to accept only peaches of such grade.

We also find the following in 46 *Am. Jur. Sec.* 328 at pages 509-510;

> " . . . It seems to be generally held that where an article is sold by a descriptive name or by description, this is, if justifiably relied on by the buyer, a warranty that the article corresponds with the descriptive name or description. This is held true, especially in the more modern cases, where the sale is of goods *by a particular description as to quality or condition.* A sale of goods by a particular description of quality imports a warranty that the goods are or shall be of that description, which becomes a part of the contract if relied upon at the time by the purchaser. *This rule applies to a sale under a trade term which by use has become generic.* Each different quality of goods may be regarded as a different kind of goods . . . "

Where specified goods are sold in compliance with an order describing the goods and the seller furnishes them, he is held to warrant that the goods are of the kind asked for. It is a substantive part of the contract that the goods shall be of the kind ordered. That is one of the terms of the contract without the fulfillment of which the contract cannot be performed.

Parrish vs. Kotthoff, 128 *Ore.* 529; 274 *Pac.* 1108

Kitterman vs. Eagle Pine Co., 122 *Ore.* 137; 257 *Pac.* 815

APPELLANT PROMPTLY NOTIFIED APPELLEES THAT IT REFUSED TO ACCEPT THE SHIPMENT WHICH WAS IN VIOLATION OF THE EXPRESS WARRANTY

ARGUMENT

The acts that constitute an acceptance of goods by the buyer are defined in *Section* 71-148 Oregon Compiled Laws Annotated:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent to the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

When the carload of doors reached North Carolina, and prior to its inspection, appellant was informed by its customers to whom it had sold the doors, that they were not of the grade F-82, as warranted (R-58-59). Inspection thereupon was made by appellant and the breach of warranty being obvious notice thereof was promptly transmitted to appellees through Meyer. The Court should consider *that appellant had already expended nearly* $1,000.00 in *freight charges alone.* It is

not unique or unusual for any prudent business man, before incurring an additional expense of that proportion, to communicate with the seller to ascertain the disposition to be made with merchandise *palmed off* to it in violation of the agreement. Certainly, no prudent business man would incur a freight liability of an additional $1,000.00 by returning the shipment without first notifying the seller. The law does not require the buyer to do a vain act. The remedy for breach of warranty is set forth in *Section* 71-169, Oregon Compiled Laws Annotated:

> "(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

Appellant had already paid in advance more than $11,000.00 when it found itself burdened with 1500 doors delivered to it in violation of an express warranty. What did it do that was inconsistent with the rights of appellees? Appellant asked them for instructions, and it was suggested it be patient, and that an investigation would be made and something done. What under the circumstances, was the buyer to do in the mean time, with more than $14,000.00 including freight and handling costs, invested in merchandise it could not sell, in merchandise it did not order?

> "In the absence of any provision in the contract of sale governing time for inspection, the buyer has a reasonable time for examination and rejection and to give notice thereof."

46 *Am. Jur. Sec.* 250, page 431

> " . . . Acceptance of possession is also to be distinguished from acceptance of, or agreement to accept, title of specific goods, so if the buyer expressly refuses to accept the title of the goods tendered, his permitting the goods to be placed on his premises for the mutual convenience of the parties cannot be considered an acceptance of title . . . "

46 *Am. Jur. Sec.* 251 page 433

We contend that appellant did not accept the shipment, on which it had already paid the full purchase price.

The conduct of the parties must be considered in the light of reasonable and prudent business men. This is not a case where the seller is awaiting his money for merchandise sold in breach of warranty. This is a case where a buyer, *paid in advance*, for *specified goods*, and was fraudulently sold and delivered something not ordered nor wanted.

In *Sig C. Mayer & Co. vs Smith*, 112 *Ore.* 559, 230 *Pac.* 355, in passing on a somewhat similar problem, we find the following:

> "It would be manifestly unjust for a seller, after supplying a part of the goods to be delivered in installments as ordered, to change the articles agreed to be sold, *or to depart from the order and deliver goods not answering the description in the original contract, and compel the defendant to ac-*

cept goods not ordered by him, because the buyer had sold part of the goods without knowing of the change. This would open wide the door to fraud." (Emphasis added)

And also review, *Eaton vs. Blackburn*, 52 *Ore.* 300, 96 *Pac.* 870; 97 *Pac.* 539, 20 *L.R.A. (NS)* 53.

Conduct which was held not to be an acceptance, in view of the circumstances, was passed upon in *Continental Lumber Co. vs. Miller (Tex. Civ. App.)* 161 *S.W.* 927. That was an action for the price of lumber tendered to the purchaser and rejected by him. Following the rejection, the parties negotiated for a settlement. During the course of the negotiations, and under the mistaken impression, that the matter had been settled, the purchaser used a small quantity of the lumber. The Court held, that this was not necessarily an acceptance.

Another pertinent authority, and on fours with the case at bar, is *James H. Smith Co. vs. Screw Mach. Prod. Co. (R.I.)* 133 *Atl.* 440. That was an action by the seller for the price of certain spindle heads to have been manufactured by the seller pursuant to a sample furnished by the purchaser. When the spindles arrived, the purchaser notified the seller that they were not in accordance with the sample, and rejected them. However, pending negotiations between the seller and the purchaser, the purchaser sent some of the spindle heads to his customer in an effort to determine

whether they were usable although not in conformity with the sample. The Court held, that this was not such an act of dominion over the merchandise as to be inconsistent with the ownership of the seller, and therefore, was not an acceptance.

Now in the case at bar, the doors did not in any manner conform to the description F-82. This is the description of a standard door readily salable in any market. The doors shipped to it were substandard and no user of these doors could be found in North Carolina.

The authorities are legion which hold, that where the purchaser retains or exercises dominion over the merchandise *while giving the seller an opportunity to make the goods conform to the order or contract, will not be held thereby to have accepted the goods.* Some of these authorities are collected in 55 *C. J. Section* 493, page 501, and read:

> "*But the circumstances surrounding* the buyer's subsequent use of or other acts in relation to the goods may be such as to prevent the same from constituting an acceptance."

To the same effect is *Williston on Sales*, Revised Ed. Vol. 3, page 11, Section 474 and also page 35:

> "Retention which might otherwise indicate an acceptance may be explained not only as stated above, *but by proof that the seller had requested the retention with promises of correction of defects or similar assurances.*"

Of course, in the case at bar, appellees indicated by their conduct they did not want the "lemons" back on their hands! Whatever appellant may have done when it found itself with 1500 unsalable doors, *for which it already paid*, was done with appellees acquiescence, and not inconsistent with the sale.

Baker vs J. C. Watson Co, supra, while involving perishable products, is apposite to the case at bar. In that case the evidence disclosed that the buyer purchased U.S. No. 1 peaches; that the peaches shipped to it did not have that quality. The contract of purchase required the five carloads of peaches to be delivered to the buyer at Laramie, Wyoming. In transit the cars were diverted by the purchaser from Laramie to Chicago. Upon arrival there, the purchaser found that the shipment did not conform to the grade of peaches purchased by it, and rescinded the contract, notified the seller thereof, and asked for instruction as to the disposition of the peaches. The seller refused to accept rescission and disclaimed further responsibility. Whereupon the buyer sold the peaches to the account of the seller, and, after deducting expenses and freight sent the proceeds to the seller who refused acceptance. The seller recovered the full purchase price. In reversing the case and passing on the various questions raised, including whether there had been an acceptance by the buyer, or acts inconsistent with a rescision, the court stated:

"It is urged appellant is liable for the full purchase price on the ground that there had been such acceptance under section 62-308 I.C.A., as to prevent its being entitled to the defense of breach of warranty and recission therefor, because the peaches were sold by appellants through LaMantia Brothers, and that such resale was conduct inconsistent with rescission. Such contention overlooks section 62-507 I.C.A. Appellant having made its election of remedies under 62-507, (1) (d) (2) I.C.A. subdivision 5 of that section defines its rights and liabilities as the buyer thus:

62-507. Remedies for breach of warranty—1. Where there is a breach of warranty by the seller, the buyer may, at his election: * * *

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received return them or offer to return them to the seller and recover the price of any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted. * * *

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept the offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 62-402."

NOTE—In Oregon similar provisions of the Uniform Sales Act are in effect. Section 71-169 O. C. L. A. (d) (2) (5). Also Section 71-170 O. C. L. A.

We particularly call to the court's attention the special concurring opinion of Justice Ailshie, wherein he remarked:

> "There are two kinds of acceptance,—" said Justice Lamar, in Delaware, L. & W. R. Co. v. United States, 231 U.S. 363, 34 S. Ct. 65, 67, 58 L. Ed. 269, 273—"one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by the purchaser, delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered."
>
> "Where an article is purchased and, after its receipt, is found defective by the vendee or not of the standard, grade, quality or kind ordered, it is sometimes easy and convenient to return it without loss or depreciation and at slight cost of redelivery; *but in many cases of long distance, shipment is too expensive to return the property to the vendor at the place from which shipped*, and, due to lack of agent or acquaintance at place to which the consignment has been shipped, it is wholly impracticable for the vendor to take possession and dispose of the property at the distant point to which it has been diverted. *The law therefore requires the purchaser to take charge of the property and dispose of it as the vendor's agent, to the best practical advantage, in case the vendor refuses to accept the return of goods.*"
> (Emphasis added)

Appellant gave immediate notice that the shipment failed to conform to the order. Appellees do not claim that it does conform. Therefore, the shipment being

in violation of the terms of the contract, no sale actually was consummated and appellant is entitled to the return of its money. This rule of law is found in 46 *Am. Jur. Sec.* 254, at page 437:

> " . . . If the buyer promptly notifies the seller that the goods do not conform to the requirements of the contract, his failure to make a manual return does not necessarily constitute an acceptance; in such a case, the general rule that to rescind a sale for fraud, defect in quality, or the like there must be an actual return or tender does not apply, *since the exercise of the right to reject is not the rescission of the sale, but prevents the consummation of a sale in the first instance . . .*"

Another authority apposite to the case at bar is *Kitterman vs Eagle Pine Co.* 122 *Ore.* 137, 257 *Pac.* 815. This was an action to recover the balance due on the purchase price of 20 carloads of lumber sold to defendant. In defense thereto the answer alleged breach of warranty as to quality. Plaintiffs were the manufacturers and agreed with defendant a wholesaler to deliver f.o.b. Grants Pass, Oregon to sell and deliver "bright lumber" only. Plaintiffs shipped dry pine lumber. The principle question before the court related to acceptance. Justice Belt, in reviewing many of the problems presented in the case, said:

> "The lumber mentioned in the contract of sale was specifically described and the minimum prices therein quoted were on "bright lumber only". It is clear that a warranty existed that the lumber shipped would comply with the description and

specifications of the contract of sale, and was of a merchantable quality . . .

"The right of inspection is to enable the buyer to ascertain whether the goods delivered conform to the contract of sale. *Where and when this right is to be exercised depends on the nature of the contract, the character of the goods, the manner in which they are shipped, and any other fact or circumstances tending to show what was within the contemplation of the parties, as expressed in their contract, or by their conduct in reference thereto. The law applicable to such right is in keeping with reason and common sense.* . . . It is the purpose of the law to give the buyer a reasonable opportunity to examine the goods delivered before there is a completed sale. . . .

"It is true that the title to the lumber passed to the defendant when it was delivered at Grants Pass, but it was a conditional title, subject to be defeated by failure of the seller to deliver the kind and quality of lumber agreed to be sold. . . .

"That warranty of the quality of goods survives the acceptance of the goods by the purchaser. . . ."
(Emphasis added)

In the case at bar, appellant had no inspection prior to shipment. It diverted and sold the doors before their arrival and it was not until its customers complained that it learned of the breach of warranty. The fact that a claim to the railroad was made for damages for 29 doors is not significant to support appellees contention that that amounted to an acceptance. The testimony is the following: (R-64-65).

A. Oh, yes, they were sold while the car was en route. All of these had been. And the remain-

der, twenty-nine I think, were damaged on arrival of the car which were, of course, left with the railroad. They were left with railroad for subsequent handling.

* * *

Q. In whose behalf did you file the claim against the railroad company?

A. We assumed we were filing it in behalf of the shipper of the doors, *since the doors, not being what we had ordered, were not our doors.* We did it purely to protect his interest on the shipment. It was the only thing that could be done with them . . . "

THE TENDER BY APPELLEES OF A CHECK IN THE AMOUNT OF $615.00 IS NOT AN ACCORD AND SATISFACTION

ARGUMENT

Appellees, subsequent to being notified by appellant that the shipment violated the terms of the agreement and was not merchantable, commenced a course of conduct directed toward the manufacturer for a settlement. The evidence indicates that the manufacturer was in straightened circumstances. (R-212) Notwithstanding, appellees represented to appellant that they had obtained $315.00, from their seller and offered to add to that sum their alleged commission of $300.00, and mailed to appellant a check for $615.00. *The truth of the matter is, that appellees realized more than a* $1,000.00 *profit on the transaction.* (R-182). Appellant returned the check of $615.00, (R-221) and

informed appellees that a visit would be made to the West Coast in an effort to settle the claim.

> "An accord and satisfaction is *the result of an agreement between the parties.* This *agreement* must have all the essentials of a valid contract,—that is, must be made between competent parties *and upon a sufficient consideration* . . . Unless *this agreement exists* between the parties, *there is no accord and satisfaction* . . ."
>
> 1 *Am. Jur. Sec.* 19, page 221

There is not one word of testimony or evidence that appellant *agreed* to accept $615.00 in settlement of an approximated $14,000.00 valid and just obligation. *Here is a plain case of fraud, admitted by appellees!* (R-216) It shocks our sense of conscience to believe for one moment that it can justly be concluded that the *unilateral action* of appellees in sending their check for $615.00 amounted to a *mutual* agreement of accord and satisfaction! The check was not accepted nor cashed. It was returned to appellees.

The law is well established that the *mere receipt by a creditor of a check is not an acceptance where prompt notice is given* and the check is not cashed.

> . . . "However, the mere receipt and retention by a creditor of a check for part of his claim is not an acceptance of a condition that the check was to be in full satisfaction, where the creditor gave prompt notice of his refusal to accept the condition and did not cash the check *or make any affirmative use of it* . . ."
>
> 1 *Am. Jur. Sec.* 29, page 230

It should be borne in mind, that appellees claim, that it was part of the alleged agreement of accord and satisfaction, that Meyer was to mail her check for $300.00. (R-106-R-212) Exh. 4. *There is no evidence that such a check was ever mailed.* On that point alone, *the alleged agreement of accord and satisfaction fails of proof.* For example, if a debtor claims as an accord and satisfaction, that he would pay a certain sum and also give another consideration, the failure to fulfill such an agreement prevents a satisfaction of the accord.

> "The rule is universally recognized that except where the new agreement is itself accepted as a satisfaction, the failure to make a payment *or otherwise perform an act required by a new agreement entered into in satisfaction of a debt or claim leaves such an agreement a mere executory accord, without satisfaction, and as such, it constitutes no bar to the enforcement of the original claim or debt.* In other words, in order that a demand or cause of action may be barred by an accord, *the general rule is that the accord must be executed.* Why the payment is not actually made or the accord execute is apparently immaterial. The promise is to satisfy, and until the promise is fulfilled, the agreement is not binding, and since it is not a bar to an action on the original debt, it follows that is of no consequence as a bar to the original claim. . . ."
>
> 1 *Am. Jur. Sec.* 65, pages 251-252

We, therefore, respectfully submit, that appellees have wholly failed to establish an accord and satisfaction.

CONCLUSION

A careful review of the evidence conclusively establishes that appellees, as vendors, sold to appellant, as vendee and the principal, a carload of doors warranted to be of a specific grade and quality known as F-82. Appellees admit that appellant was defrauded in relation to the warranty. The violation by appellees of the provisions of the Uniform Sales Act being overwhelming, the judgment of the lower court should be reversed and a judgment rendered in favor of appellant for its damages.

Respectfully submitted,

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